SINGAPORE REPORTS

RE LIN SECURITIES (PTE)

PETER CHI MAN KWONG & 2 ORS. v. ASIA COMMERCIAL BANK & 20 ORS.

[O.C.J. (Chao Hick Tin J.C.) 21 March 1988]

[Singapore – Originating Summons No. 1250 of 1986]

Companies and Corporations – Letters of hypothecation – "Hypothecation" – Meaning of – Whether creates a charge – "Charge" – Definition of – Whether floating charge or fixed charge – Absence of authorities – Novel case.

Companies and Corporations – Letters of hypothecation – Daily certificates attached to some letters of hypothecation – Whether daily certificates have any significance.

The plaintiffs were the liquidators of Lin Securities (Pte) Ltd. ("the company"). Prior to the appointment of the liquidators, the company received credit facilities from 21 banks, the present 21 defendants. The company in return gave various letters of hypothecation ("LOH") whereby the assets of the company were purportedly charged to the 21 banks.

The main issue in the present case was whether each LOH created a charge and if so, whether the charge was a fixed or floating charge.

Held: (1) the LOHs issued to OCBC (and the other 20 banks) created a charge. Part I of the LOH expressly stated that in consideration of the credit and other banking facilities granted, the company charged to OCBC all shares, stocks *etc.* While the expression used in some of the LOHs issued to other banks was "pledge" or "hold under lien", these expressions meant and were intended to mean in the context very much the same thing, *i.e.* creation of a charge;

(2) whether an instrument created a fixed or a floating charge does not necessarily depend on the label given to it or a particular set of words used by the parties;

(3) one should not determine the effect of the LOH wholly within the four corners of the document. It must be viewed in the context of the surrounding circumstances of the transaction;

(4) in construing the LOH, the court cannot ignore the essential characteristics of the business of the company. The issues raised in the present originating summons were certainly novel and there appeared to be an absence of authority on point. It seemed to be the first case of its kind. The transaction must be viewed in the commercial context in which the LOH was given;

(5) the LOH issued to OCBC in its true nature created a floating charge. For much the same reasons, the other LOHs issued to the other 20 defendants created floating charges.

Cases referred to:

(1) *Colonial Bank* v. *Whinney* (1885) 30 Ch.D. 261 (cited).
(2) *Harrold* v. *Plenty* [1901] 2 Ch. 314 (cited).
(3) *National Provincial & Union Bank of England* v. *Charnley* [1924] 1 K.B. 431 (cited).
(4) *Evans* v. *Rival Granite Quarries Ltd.* [1910] 2 K.B. 979 (refd).
(5) *Government Stocks & Other Securities Investment Co.* v. *Manila Rly Co.* [1897] A.C. 81 (refd).
(6) *Re Yorkshire Woolcombers Association Ltd.* [1903] 2 Ch. 284 (foll'd).
(7) *Re Benjamin Cope & Sons Ltd.* [1914] 1 Ch. 800 (refd).
(8) *Illingworth* v. *Houldsworth* [1904] A.C. 355 (cited).
(9) *Re Amargh Shoes Ltd.* [1984] B.C.L.C. 405 (refd).
(10) *James Miller & Partners Ltd.* v. *Whitworth Street Estates Ltd.* [1970] A.C. 583 (foll'd).
(11) *Schuler A.G.* v. *Wickman Machine Tool Sales Ltd.* [1974] A.C. 235 (foll'd).
(12) *Prenn* v. *Simmonds* [1971] 1 W.L.R. 1381 (foll'd).
(13) *Lemon* v. *Austin Friars Investment Trust Ltd.* [1926] Ch. 1 (refd).
(14) *Hoare* v. *British Columbia Development Association* [1912] W.N. 235 (refd).
(15) *Rumble* v. *Heygate* (1870) 18 W.R. 749 (refd).
(16) *In Re Young Hamilton & Co.* [1905] 2 K.B. 772 (distd).
(17) *Official Assignee of Madras* v. *Mercantile Bank of India Ltd.* [1934] All E.R. Rep. 237 (distd).
(18) *Re Wait* [1927] 1 Ch. 606 (refd).
(19) *Re Brightlife Ltd.* [1986] 3 All E.R. 673 (refd).
(20) *Mercantile Bank of India* v. *Chartered Bank of India, Australia & China and Strauss & Co. Ltd.* [1937] 1 All E.R. 231 (refd).
(21) *Re Keenan Bros. Ltd.* [1986] B.C.L.C. 242 (refd).
(22) *Re Yolland, Husson & Birkett Ltd.* [1908] 1 Ch. 152 (apprvd).
(23) *Re Mechanizations (Eaglescliffe) Ltd.* [1966] Ch. 20 (apprvd).
(24) *Re C L Nye Ltd.* [1971] 1 Ch. 442 (apprvd).

ORIGINATING SUMMONS.

Helen Yeo (Ms) for the plaintiffs.

Scott Thillagaratnam for the 1st and 7th defendants.

Davinder Singh (*Mohan Pillay* with him) for the 2nd, 10th, 11th, 13th and 15th defendants.

Sarbit Singh (*Chye Kit Min* with him) for the 3rd defendant.

Ng Chai Ngee (Ms) for the 4th defendant.

Woo Bih Li (*Antony Lee* with him) for the 5th, 14th, 19th and 20th defendants.

Timothy Lloyd, Q.C. (*Sarjit Singh Gill* with him) for the 6th and 16th defendants.

Sarjit Singh Gill for the 12th defendant.

Randhir Ram Chandra for the 8th defendant.

Molly Lim (Ms) (*Indranee Rajah (Ms)* with her) for the 9th defendant.

Florence Chew (Ms) for the 17th defendant.

David Hew (Koh Ee Lin (Ms) with him) for the 18th defendant.

Shantini Ramachandra (Ms) for the 21st defendant.

Cur. Adv. Vult.

Chao Hick Tin J.C.: The plaintiffs were appointed by an order of court dated 18 July 1986 made in Companies Winding Up No. 183/1986 as the liquidators of Lin Securities (Pte) Ltd. (hereinafter called "the company"). The present application by the plaintiffs is to seek the direction and determination of the court in relation to certain questions that arose in the course of discharging their functions.

The company was registered on 30 April 1976 as a private exempt company limited by shares. Prior to 28 February 1986, the date on which the liquidators were first appointed as provisional liquidators of the company, its business was that of stockbroking. At that time the company had credit facilities from 21 banks, and they are the 21 defendants in these proceedings. In consideration of the credit facilities extended, the company gave to each bank a letter of hypothecation (LOH). In many instances, more than one such letter were given to the same bank where the latter granted to the company additional facilities. Altogether, 60 such letters of hypothecation were issued and they were all registered by the banks with the Registry of Companies.

The words used and the clauses in these LOHs were not all identical. Mrs. Yeo, counsel for the liquidators, listed the LOHs under five categories.

Between 24 and 28 February 1986, 18 suits were instituted by the banks (except the 4th, 20th and 21st defendants) against the company. An *ex parte* interim injunction was obtained by the banks for delivery up of the shares charged under those LOHs and for restraining the company from disposing them.

At the commencement of the hearing of this originating summons before me, all the parties agreed to a reformulation of the issues that should be decided by the court in place of those prayed for in the originating summons. The parties had also agreed that, in view of the constraints of time, arguments at this stage should be confined to the first set of agreed issues which is as follows:

(1) Existence, Nature and Effect of Security.

(a) Do all or any, and if so which, of the security documents relied on by each bank create or constitute a charge by the company?

(b) If so, what assets are affected by the charges?

(c) What is the nature of the charge? In particular, is it a fixed or a floating charge?

(d) Did the NIL certificate issued on 25 February 1986 have any, and if so, what effect?

The main submission, in so far as the defendants were concerned, was made by Mr. Lloyd, who appeared for the 6th and 16th defendants. He argued that the LOH created a fixed charge. With the exceptions of the 4th and 21st defendants, counsel for the other defendants had all associated themselves with the arguments put forward by Mr. Lloyd as to the nature and effect of the LOH. For an orderly disposal of the matter before me, I propose to examine only the LOHs issued to the 16th defendant (OCBC) as the other LOHs issued to the other defendants do not differ significantly in the material particulars from those issued to OCBC. The 4th defendant submitted that the LOHs created a floating charge whereas the 21st defendant appeared to be taking a neutral stand on the issue.

Altogether five LOHs were issued by the company to OCBC. The first was dated 11 March 1982 wherein in consideration of one million dollars overdraft facilities granted by OCBC, the company thereby created a charge and a pledge in favour of OCBC in the following terms:

> "1. In consideration of your ... making advances or continuing to make advances or granting or continuing credit or other accommodation ... we, Lin Securities (Pte), ... hereby charge to you all shares, stocks, bonds, securities and documents which are now or shall at any time hereafter be in our custody or possession and stated and set forth in the daily certificates furnished to you by us (all of which said shares, stocks, bonds, securities and documents stated and set forth in the said daily certificates furnished to you daily are hereinafter referred to as 'the said securities') as a continuing security for the payment and satisfaction on demand of all monies and liabilities absolute or contingent ... AND we agree that you shall have a pledge upon the said securities and hold the said securities which now are or shall at any time hereafter be deposited with or held by you or transferred or caused to be transferred to you or your nominees by us as continuing security for the payment and satisfaction of the aforesaid monies and liabilities ... AND until payment of such monies and liabilities to you we shall hold the said securities stated

and set forth in the daily certificates furnished to you at the end of each business day upon trust for you. We shall sell such part or parts of the said securities under your directions or authority given from time to time by endorsement on the said daily certificates or otherwise and we shall hold the proceeds of such sales in trust for you and pay over the same to you forthwith on receipt of the proceeds ..."

In the LOH, the company further:

(i) Agreed that OCBC "shall have the right to inspect the said securities at (the company's) premises at any time of the day with or without appointment."

(ii) Agreed that OCBC were "entitled to immediate possession of the said securities and that (OCBC) may at any time in (their) sole and absolute discretion take possession of the said securities or any part or parts thereof. It shall be lawful for (OCBC) (their) officers and servants and agents at any time without previous notice to (the company) to enter seize and take possession of the said security or any part or parts thereof in whatever place or places they may happen to be."

(iii) Undertook and declared "that the said securities are and shall be free from all charges and encumbrances and that (the company is) and shall be the beneficial owners thereof free from all encumbrances save and except the security and trusts hereby created", and also undertook "not to create or make any charge, pledge, hypothecation or encumbrance over the said securities ... and not to make any sale transfer or disposition of all or any of the said securities ... without (OCBC) prior express consent or approval or release".

(iv) Irrevocably authorized OCBC "to do any and all proper and necessary acts to transfer complete and vest the title of any of the said securities" in OCBC or their nominees and in furtherance thereof the company undertook to "execute and sign all transfers, power of attorney and other documents that (OCBC) may require for completing or perfecting title" in OCBC or their nominees.

(v) Authorized OCBC "at any time without any notice to (the company) sell or dispose of the said securities or any part thereof ... by public or private sale ... as (OCBC) may think fit without being in any way responsible for any loss occasioned thereby howsoever arising."

The form of the daily certificate was annexed to the LOH. It may be noted that the form only required three types of particulars to be furnished – description of securities, quantity and transacted value. It, however, did not require that the specific securities be identified, *i.e.* the listing of the serial numbers of the relevant share certificates.

A first supplemental LOH was executed by the company on 21 November 1983 in favour of OCBC when the company requested for an increase in the overdraft facilities to two million dollars. This supplemental LOH was labelled as the first further LOH. Besides incorporating the terms of the principal LOH, it also provided that:

(a) As a continuing security for all moneys owing by the company to OCBC under the prior LOH and hereunder, OCBC "shall have a pledge upon all shares ... more particularly described in the daily certificate or certificates to be furnished by (the company) to (OCBC) which said shares ... are acquired by (the company) in the normal course of trading whether such shares ... are registered in (the company's) name or in the names of (the company's) nominees and whether such shares ... are under (the company's) control, possession or otherwise."

(b) The company shall not "create any further LOH in favour of any other bank without first obtaining (OCBC) consent thereto in writing."

Subsequently on 21 May 1984, 22 November 1984 and 28 August 1985 the company further executed the second, third and fourth further LOHs when the overdraft facilities granted by OCBC were increased to three million dollars, six million dollars and ten million dollars respectively. The terms of the second, third and fourth further LOHs were identical to those of the first further LOH.

These are the relevant provisions of the five LOHs issued to OCBC. The first point made by counsel for the liquidators is that one cannot hypothecate shares. She said she was not able to trace a single case where shares had been hypothecated. Neither were any of the other counsel able to cite any such case. Assuming that it is possible to hypothecate shares, she conceded that by the LOHs, the company and OCBC (as well as the other banks) had intended to create a charge over the shares. But she went on to argue that they had

succeeded in creating neither a fixed charge nor a floating charge.

The reasons which she advanced to contend that the LOH did not create a fixed charge are broadly the following:

(i) The shares charged were not identified or ascertainable; the daily certificates did not specify the precise shares of a counter by listing the serial numbers of the relevant share certificates.

(ii) Notwithstanding the apparent wording in the LOH to the contrary, the company was given the power or licence to trade and to substitute shares listed in one daily certificate with other shares which the company acquired or obtained in the course of its business.

(iii) There were multiple hypothecations of the same shares to different banks as shown in Schedule H to the affidavit of Chin Yoke Choong filed on 3 November 1987.

(iv) It was not the intention of the parties to create a fixed charge, otherwise OCBC and the other banks would not have all registered their LOHs with the Registry of Companies under section 131(1) and (3)(g) of the Companies Act.

Counsel for the liquidators also argued that the LOH failed to create a floating charge because neither all the undertaking of the company nor a class of the assets of the company was charged. In any event, as the banks had failed to register the daily certificates under section 131, she contended that the floating charge was void against the liquidators.

I think it would be appropriate if I begin by briefly examining the term "hypothecation" According to Gutteridge & Megrah: *Law of Bankers' Commercial Credits* (6th Ed.) the term "hypothecation" crept into English legal terminology possibly by way of maritime law in which it is used to denote a transaction by which maritime property is made available as security for a debt without transfer to the creditor either of property or possession. Hypothecation is not a term of art. It would appear that letters of hypothecation are most commonly used in relation to goods.

Holden on *Securities for Bankers' Advances* (5th Ed.) refers to it as (at p. 268) "a legal transaction whereby *goods* may be made available as security for a debt without transferring either the property or the possession to the lender". Similarly, Gutteridge & Megrah at p. 187 states that strictly the term "letter of hypothecation" is "to be applied to the case where the banker is given a charge over *goods* without possession of them or of the documents of title and even before they are in existence". However, Hart on *Law of Banking* (4th Ed.) Vol. II at p. 906 seems to define it a little wider thus: "Where *property* is charged with the amount of a debt, but neither ownership nor possession is passed to the creditor, it is said to be hypothecated." (The italics in the foregoing quotes are added.)

The contract of hypothecation is to be distinguished from pledge in that a pledge entails delivery of possession whereas a hypothecation does not. Hypothecation is a form of equitable charge.

Shares are choses in action: *Colonial Bank* v. *Whinney*.[1] They are undoubtedly a kind of property. They may be mortgaged and an equitable mortgage of shares may be created by the deposit of share certificates as Cozens Hardy J. observed in *Harrold* v. *Plenty*[2] at p. 316: "The deposit of the certificate by way of security for the debt seems to me to amount to an equitable mortgage." I cannot see any reason nor can I perceive any any objection in principle why shares may not be hypothecated. In any event, what is more important is not the title of a document itself or a specific word used but the contents therein viewed as a whole.

No particular form of words is necessary for the purpose of creating a charge. Any written instrument showing the intention of the parties that a security should be thereby created would suffice although it contains no general words of a charge: see Fisher & Lightwood on *Law of Mortgages* (9th Ed.) at p. 13. The authors further define a charge as follows (at p. 156):

> "A charge is a security whereby real or personal property is appropriated for the discharge of a debt or other obligation but which does not pass either an absolute or a special property in the subject of the security to the creditor, nor any right to possession, but only a right of realization by judicial process in case of non-payment of the debt."

It is enough that the parties have made it plain by the language they have used that it was their intention to create a charge: Bankes L.J. in *National Provincial & Union Bank of England* v. *Charnley*.[3] In the same case, Scrutton L.J. said the following at p. 445:

"I am not going to attempt an exhaustive definition of an equitable charge, but I think that the substance of an equitable charge is this: if an agreement be made to grant some interest in existing or future property for the purpose of securing the payment of a debt, that agreement to give the security confers an equitable security or charge, though all the formalities necessary to create the actual security have not been complied with."

And Atkin L.J. stated the following at pp. 449-450:

"It is not necessary to give a formal definition of a charge, but I think there can be no doubt that where in a transaction for value both parties evince an intention that property, existing or future, shall be made available as security for the payment of a debt and that the creditor shall have a present right to have it made available, there is a charge, even though the present legal right which is contemplated can only be enforced at some future date, and though the creditor gets no legal right to possession, but only gets a right to have the security made available by an order of the court. If those conditions exist, I think there is a charge."

In the light of the foregoing, it seems clear beyond any doubt that the LOHs issued to OCBC (and the other 20 banks) created a charge. Paragraph 1 of the LOH expressly stated that, in consideration of the credit and other banking facilities granted, the company charged to OCBC all shares, stocks *etc.* While the expression used in some of the LOHs issued to the other banks was "pledge" or "hold under lien", in my view, these expressions meant and were intended to mean in the context very much the same thing, *i.e.* creation of a charge.

The next question for determination, which is the key question, is whether the charge created is a fixed charge or a floating charge.

Generally, a charge on all the property, both present and future, will create a floating charge. So will a charge upon all the property now belonging or hereafter acquired by the company (see Palmer on *Company Law* Vol. I 23rd Ed. paragraph 44-06). A charge over stock in trade and book debts is normally a floating charge. But there is no magic in any particular set of words. A floating charge may be created without resort to such classical words and expressions as "present or future property" or "undertaking". Fletcher Moulton L.J. in *Evans* v. *Rival Granite Quarries Ltd.*[4] at p. 993 said:

"I do not deny that in the earlier cases the actual words of the particular documents may have influenced the courts and enabled them to draw the conclusions which they did. But at an early period it became clear to judges that this conclusion did not depend upon the special language used in the particular document but upon the essence and nature of a security of this kind."

The crucial thing is that what are charged must be some elements of the business itself of the debtor company as a going concern. Lord MacNaghten said in *Government Stocks & Other Securities Investment Co.* v. *Manila Rly. Co.*[5] at p. 86: "A floating security is an equitable charge on the assets for the time being of a going concern." The circumstances surrounding or recitals to a document creating a charge may be relevant to ascertaining the intention of the parties whether the business of the debtor company continues to be carried on.

The most often cited definition of a floating charge is that given by Romer L.J. in *Re Yorkshire Woolcombers Association Ltd.*[6] at p. 294:

"... one must, I think, deal with the question ... according to the circumstances of each particular case ... nor am I prepared to say that there will not be a floating charge within the meaning of the Act which does not contain all the three characteristics that I am about to mention, but I certainly think that if a charge has the three characteristics that I am about to mention it is a floating charge. Firstly, if it is a charge on a class of assets of a company, present and future; secondly, if that class is one which, in the ordinary course of the business of the company would be changing from time to time; and thirdly, if you find that by the charge it is contemplated that, until some future step is taken by or on behalf of those interested in the charge, the company may carry on its business in the ordinary way as far as concerns the particular class of assets I am dealing with."

Palmer on *Company Law* (23rd Ed.) at paragraph 44-05 puts it thus:

"It is evident ... that a floating charge is an equitable charge which does not fasten upon any specific or definite property, but is a charge upon property which may be constantly varying: it will normally be upon the whole of the company's property, including any which is subject to a fixed charge, but it can be restricted to a limited class of property, and the property which is subject to the floating charge can be dealt with by the company without consulting the holder of the charge and may be sold, exchanged or otherwise dealt with in any way that the directors may think fit provided that it is in the ordinary course of business."

The floating charge was created during the Victorian days to enable manufacturing and trading companies to raise loan capital on debentures. The rationale for the invention and recognition of the floating charge was succinctly explained by Sargeant J. in *Re Benjamin Cope & Sons Ltd.*[7] at pp. 805-806:

"Floating charges appear to have originated through the courts having recognized that companies may validly charge the whole of their undertaking and assets, and having given practical effect to such a charge. To treat such a security as constituting a specific charge on the property of the company at the date of the charge itself would paralyse the

business of the company, since the assent of the chargee, or of the whole body of chargee, would thus be necessary to any sale or other disposition of any part of the property of the company in the course of carrying on its business. And accordingly the courts solved the problem by treating such a charge, not as being specific or fixed, but as being ambulatory and attaching to the property for the time being of the company at the time when the charge came to be enforced."

Accordingly, the utility of a floating charge is that it removes the need for an endless series of deeds of substitution and release and thus facilitates business.

The distinction between a fixed charge and a floating charge was expressed thus by Lord MacNaghten in *Illingworth* v. *Houldsworth*(8) at p. 358:

"A specific charge, I think, is one that without more fastens on ascertained and definite property or property capable of being ascertained and defined; a floating charge, on the other hand, is ambulatory and shifting in its nature, hovering over and, so to speak, floating with the property which it is intended to affect until some event occurs or some act is done which causes it to settle and fastens on the subject of the charge within its reach and grasp."

It is clear that whether an instrument creates a fixed or a floating charge does not necessarily depend on the label given to it or a particular set of words used by the parties. In *Re Yorkshire Woolcombers Association Ltd.*(6) where it was an absolute and immediate assignment of a particular class of assets, *i.e.* book debts, present and future, Farwell J. held (affirmed by the Court of Appeal and the House of Lords): "In my opinion this is, although the parties have chosen to call it a specific security, nothing more nor less than a floating security." Reference may also be made to *Re Armagh Shoes Ltd.*(9) at p. 408 where the deed charged "by way of fixed charge all receivables, debts, plant, machinery, fixtures, fittings and ancilliary equipment now or at any time hereafter belonging to the mortgagor" and the court nevertheless held it to create a floating charge.

Reverting to the facts of our present case, the LOH executed by the company in favour of OCBC, as conceded by Mr. Lloyd, was of a hybrid nature. The principal clause of the LOH, "charged to (OCBC) all shares, stocks, bonds *etc.* which are now or shall at any time hereafter be in (the company's) custody or possession", is very much the sort of formula associated with the creation of a floating charge. However, the same clause went on to introduce the system of daily certificates thus: "and stated and set forth in the daily certificates furnished" by the company to OCBC. As stated above, the form of the daily certificate was set out in the annex to the LOH and as prescribed did not require that the company identify the specific share certificates, by reference to the serial numbers, which were charged to OCBC. Only three sets of particulars were required to be furnished, *i.e.* description of the security, the quantity and the value. The actual daily certificates issued conformed to that. In short, there was nothing in each daily certificate to indicate which specific share certificates were thereby charged to the bank.

I should, in this connection, mention that besides the LOH issued to OCBC there were only two other LOHs to which the form of a daily certificate was annexed. These were the LOHs given to the 4th and 6th defendants. In the case of the LOH issued to the 14th defendant, while there was no form attached to the LOH, it specifically provided that the daily certificate should contain the name of the listed company, the quantity and the last traded price. In all the other LOHs, no form of a daily certificate was attached and no particulars prescribed. But as exhibited by the defendants in their affidavits, the actual daily certificates issued by the company were identical in all cases and consisted of these particulars: quantity, counter, unit price and value. While the daily certificates exhibited were those issued in January/February of 1986, there is nothing to suggest that the first daily certificate issued to each defendant contemporaneously with or soon after the execution of each LOH was any different from those exhibited. Indeed, no such contention was made by any of the counsel and they had all argued on the premise that that was the form of daily certificate issued by the company from the very beginning. It follows, therefore, that it was not the intention of the parties to identify the specific share certificates in each daily certificate.

Another significant feature of the LOH issued to OCBC (and which in essence is also to be found in the LOHs issued to the other banks) is this. The charging provision expressly provided for the issue of daily certificates by the company to the bank. It contemplated the company issuing each certificate as a matter of course on a daily basis. It did not expressly provide that the company could only issue a new daily certificate, which could very well comprise different securities, on the release by the bank of the certificate issued the day before or on the release of the securities set out in such previous certificate. I am conscious that in a later part of the clause it was provided

that the company "shall sell such part or parts of the said securities under (OCBC's) directions or authority given from time to time by endorsements on the said daily certificates or otherwise". And further in a subsequent clause the company undertook "not to make any sale transfer or disposition of all or any of the said securities ... without (OCBC's) prior express consent or approval or release". However, it should be noted that this release by endorsement on the daily certificate was not stated to be on a "daily basis" but "from time to time". In any event, the link between the issue of daily certificates and the restrictions against sale set out in those two provisions is obscure. I am of the view that as the securities listed in the daily certificate could be different one from another and if it were intended that the securities in one daily certificate could only be released by endorsement before a new daily certificate could be issued there should be express provision for daily release and/or express provision to provide that no new daily certificate could be issued unless the earlier daily certificate was released by the bank. There was nothing in the LOH to that effect. In this regard, it is important to note that as the bank was giving the overdraft, it was entitled to demand that the LOH be drawn to its satisfaction. Accordingly, it seems to me that the issue of a new daily certificate was not contingent on the release by the bank of the immediate preceding daily certificate. As will be mentioned later in this judgment, Mr. Lloyd seemed to have accepted that the issue of a daily certificate was to be made by the company as a matter of course.

The other clauses in the LOH introduced elements or features which are associated more with a fixed charge, *i.e.* the company would hold the securities set forth in the daily certificates furnished at the end of each day upon trust for the bank; the bank had the right to inspect securities at the company's premises; the bank had the discretion to take possession of the shares; the bank would have a pledge over the securities. However, the restriction that the company would not create any charge over the securities listed in each daily certificates is neutral. Such a restriction appears to be found in instruments creating a fixed charge as well as a floating charge. I should add here that in some of the LOHs the restriction imposed on the company was not to create any charge "ranking in priority to or *pari passu*" with the LOHs. My comment is, if a fixed charge was created by the LOHs, could the company on its own ever create a charge "in priority to" the LOHs. The answer is surely no.

I should, at this juncture, briefly touch on the question whether a pledge can in law be created over shares. It appears to be doubtful. *Halsbury's Laws of England* 4th Ed. Vol. 32 at paragraph 412 states: "A deposit of share certificates to secure a debt ... whether accompanied or unaccompanied by a transfer in blank as to the name of the transferee amounts to an equitable mortgage and not a pledge." Apparently in some cases in which the distinction between a mortgage and a pledge was not material to the decision, the word "pledge" has been used as applicable to a security by deposit of certificates of shares. In any event, the very concept of pledge presupposes that possession of the relevant share certificates in question has been transferred to the bank. Before transfer of possession, this right can only be described as an inchoate, or incomplete, pledge. However, even if the use of the word "pledge" is not appropriate for shares, one has to read the document as a whole to determine its effect – see *Charnley's* case[3] at p. 441 where the word "demise" was inappropriately used in relation to chattels but the court nevertheless held that the instrument did create a charge over the chattels.

In construing the LOH, I am mindful of the fact that the court is not entitled to rely upon anything which any party subsequently did or said. In *James Miller & Parnters Ltd.* v. *Whitworth Street Estates Ltd.*[10] Lord Reid said at p. 603:

> "I must say that I had thought that it is now well settled that it is not legitimate to use as an aid in the construction of the contract anything which the parties said or did after it was made. Otherwise one might have the result that a contract meant one thing the day it was signed, but by reason of subsequent events meant something different a month or a year later."

and Lord Hodson said the following at p. 606:

> "I should add that I cannot assent to the view which seems to have found favour in the eyes of the Master of the Rolls and Widgery L.J. that as a matter of construction the contract can be construed not only in its surrounding circumstances but also by reference to the subsequent conduct of the parties."

and Viscount Dilhorne made these observations at p. 611:

> "I do not consider that one can properly have regard to the parties' conduct after the contract has been entered into when considering whether an inference can be drawn as to their intention when they entered into the contract, though subsequent conduct by one party may give rise to an estoppel. *Their conduct at the time of entry into the contract may, however, be very relevant and regard can, I think, properly be had to that.*" (italics added).

This ruling in *Whitworth Street Estate*[10] was reaffirmed subsequently in another House of Lords decision in *Schuler A.G.* v. *Wickman Machine Tool Sales Ltd.*[11] where at p. 260 Lord Morris made the following additional comment:

> "If on the true construction of a contract a right is given to a party, that right is not diminished because during some period either the existence of the right or its full extent was not appreciated."

Counsel for the liquidators has quite rightly conceded to the submission made by Mr. Lloyd that subsequent conduct of the parties should not be relied upon to construe the LOH. But, as the authorities indicated, surrounding circumstances would be relevant and could be taken into account. Cozen-Hardy L.J. made this quite plain earlier in *Re Yorkshire Woolcombers Association Ltd.*[6] where he said (at p. 297): "In construing this deed, we are of course entitled and bound to a certain extent to look at the surrounding circumstances."

Finally, on this point, I would refer to what Lord Wilberforce said in *Prenn* v. *Simmonds*[12] at p. 1385:

> "In my opinion, evidence of negotiations, or of the parties' intentions ... ought not to be received and evidence should be restricted to evidence of the factual background known to the parties at or before the date of the contract, including evidence of the 'genesis' and objectively the 'aim' of the transaction."

Accordingly subjective evidence of the intention of the parties is not admissible, but the court can properly have regard to what has been called the matrix of fact, *i.e.* the extrinsic circumstances surrounding the transaction including the conduct of the parties at the time the contract was entered into.

Mr. Lloyd contended that the security created was a fixed charge because the terms of the LOH were wholly inconsistent with the company having any right to deal with the shares included in the current daily certificate. While conceding that the assets comprised in the security "could, and to some extent did, change once per working day, on the presentation of a new daily certificate which listed different scrips", he argued that "any new daily certificate had to list shares to a given value, and which were acceptable to the bank. And once a specific parcel of shares had been included in a daily certificate, it remained subject to the bank's security unless and until a later daily certificate was issued which did not include it." Accordingly, he said that the LOH and the daily certificates created "valid fixed equitable charges over ascertained securities in those cases where the particular shares comprised in the list can be identified; and in all other cases created agreements binding on (the company) and specifically enforceable, to create such a charge over assets as described in the daily certificate." Mr. David Hew for the 18th defendant submitted that, while there was no attempt to create a floating charge in the strict sense, the intention appeared to have been that the bank should enjoy an "ambulatory fixed charge" that would attach as a specific charge to whatever stocks might from time to time be described in the periodical certificates. Mr. Davinder Singh for the 2nd, 10th, 11th, 13th and 15th defendants argued that the daily or weekly certificates were akin to changing schedules to an agreement and were designed to evidence the content of the fixed charge. In order not to overly burden this judgment, I have to omit the submissions of the other counsel which were generally along similar lines.

It seems to me that one should not determine the effect of the LOH wholly within the four corners of the document. It must be viewed in the context of the surrounding circumstances of the transaction. First was of course the business of the company itself, the stockbroking business. I think this court is quite entitled to take judicial notice of what this line of business involved and how such business was transacted, *i.e.* the buying and selling of shares on behalf of clients. This was averred to in the affidavits of the plaintiffs and the defendants. While the affidavits set out facts as they were in early 1986, there is no reason for me to think that that was not the position earlier when each LOH was executed. The share certificates would be invariably held by the company for short periods before they were handed over to clients who purchased them or to purchasers of other stockbroking companies. There would therefore be this constant turnover. Indeed, the system of daily certificate was a clear affirmation by the parties that they recognized this fact.

Secondly, at the time each LOH was executed, the relevant bank, other than the Industrial Commercial Bank which had the first LOH registered as a charge in its favour, would have noticed that other banks also had similar charges over shares of the company. As set out in Schedule A in exhibit "CYC-1" to the affidavit of Chin Yoke Choong filed on 21 October 1986, there were altogether 60 charges registered with the Registry of Companies (ROC). Even in the case of the Industrial

Commercial Bank, it obtained a second LOH from the company and had it registered as the fourth charge.

Thirdly, and this point is related to the second, each and every bank registered its charge or charges with the ROC. A fixed charge does not require to be registered. In this regard, I have noted the explanation offered by the defendants that the registration should be viewed as effected out of abundance of caution. This explanation is undoubtedly of considerable force as such an approach of caution is often adopted by parties and their solicitors. On the other hand, counsel for the liquidators argued that the fact that every bank registered its LOH went to show its intention was to create a floating charge.

The construction to be placed on the LOH must take into account these surrounding circumstances and the fact that the company was not required to identify in the daily certificate the precise share certificates that were being charged. Equally important, if not more so, I must also have regard to the fact that the LOH appears to permit the company to issue a daily certificate automatically without any need for release of the previous daily certificate or the shares set out in such previous certificate.

I will now deal with the question: what is the significance of the fact that the LOH did not require that the daily certificate should specify the serial numbers of the relevant share certificates. This raises, *inter alia,* the question of identifying share certificates from a larger bulk which would arise if the quantity of shares of a particular counter stated in a daily certificate was less than the quantity held by the company on that day.

The case *Lemon* v. *Austin Friars Investment Trust Ltd.*[13] was cited to me to show that a charge of a portion of an asset could still be a fixed charge. In that case, the company issued income stocks (which the Court of Appeal held to constitute debentures) where it was provided that three-fourths of the net profits of the company of each year or a sum equal thereto should be applied in or towards payment of the income stocks. However, the question whether a fixed charge was thereby created was not expressly declared by the Court of Appeal. Sargeant L.J. (at p. 19) said:

"Thus there is a question which it is not necessary for us to decide whether the moneys would be payable in a winding up. Mr. Upjohn thought it essential to his argument to contend, as I understood it, that the moneys would not be payable in a winding-up, inasmuch as they were only payable out of profits, and profits necessarily cease on the making of a winding-up order."

and at p. 21 he stated:

"I think ... it does ... entail a charge on property even if it is only a charge on the profits of the company, to arise while the company is going on. The profits of the company, until they have been declared and distributed as dividends, are, of course, part of the property of the company and this, in my opinion, is obviously a document which entitled the holder to an enforceable charge on a fractional proportion of the profits of the company as and when those profits shall be ascertained."

It may be of interest to note that in a somewhat similar fact-situation in *Hoare* v. *British Columbia Development Association*[14] the court held that a floating charge was created. Another case cited, *Rumble* v. *Heygate*[15], which concerned an agreement to give so much of a specified piece of land as may be necessary for a specified purpose, does not appear to be of much help either.

Cases like *In Re Young Hamilton & Co.*[16] are clearly distinguishable. In that case the traders, who had obtained advances from bankers on the security of cloth of the traders then in the hands of bleachers, gave letters of lien to the bankers accompanied by the bleachers' receipts for the goods. There the Court of Appeal held that a charge was created in favour of the bankers and that "the bank had in equity a right to an injunction restraining (the traders) from doing anything inconsistent with their holding the goods on account of the bank and under lien to the bank" – Vaughan Williams L.J. at p. 784. Very similar fact situation prevailed in the later case, *Official Assignee of Madras* v. *Mercantile Bank of India Ltd.*[17] In these two cases, the goods were in the hands of third parties and they were clearly identifiable.

On the other hand, *Re Wait*[18] was cited to me in support of the argument that the LOH created a floating charge. In that case, on 20 November 1925 Wait bought 1,000 tons of a special wheat ex Challenger, expected to load in December 1925 at Oregon. The next day he sold 500 tons of the wheat to sub-purchasers. The wheat was shipped in bulk at Oregon on 21 December 1925. Before the goods arrived, the sub-purchasers made payments by cheque to Wait who, having paid this cheque to his bank and hypothecated the 1,000 tons bill of lading, became a bankrupt before the ship arrived. The trustee having redeemed the bill of lading claimed to retain the entire 1,000 tons, leaving the sub-purchasers their remedy in damages. The

Court of Appeal by majority held that there was no appropriation or identification of a particular 500 tons as to effect an equitable assignment giving the sub-purchasers a beneficial interest therein or a lien in respect thereof. Lord Hanworth M.R. in arriving at his decision referred and relied on, *inter alia,* two earlier cases as follows (at p. 619):

"In *Hayman & Son* v. *M'Lintock* (1907 S.C. 936) the question arose whether the trustee in bankruptcy of a purchaser of flour, stored in a warehouse, was entitled to claim the flour in priority to the holders of certain store warrants and delivery orders which had been given to the holders on the sale of aliquot portions of the flour by the bankrupts to them. It was held that the trustee's title prevailed. The Lord President, Lord Dunedin, said that though there was no question as to the contract of sale of the flour lying in the store, yet the bankruptcy intervened before anything was done in the way of separating the bags; and Lord Maclaren added that as the sacks were neither numbered, nor marked, nor put into receptacles, nor ascertained in such a way as to distinguish them from other flour in the warehouse, no effectual right of security was constituted by the delivery order given.

...

Lastly, in *Laurie* v. *Dudlin & Sons* ([1926] 1 K.B. 223) the Court of Appeal held that when a delivery order for 200 quarters of maize had been given to the buyers and lodged with the warehouseman in whose custody there were 618 quarters of maize, the holders of the delivery order were not entitled to recover the goods named in the delivery order before an appropriation of the 200 quarters had taken place, that there had been no severance of the 200 quarters from the bulk, and that no property had passed, and that there had been no ascertainment of the goods. Scrutton L.J. in terms followed Lord Dunedin in *Hayman & Son* v. *M'Lintock* (1907 S.C. 936).

Quite clearly, on the question of appropriation and identification, much would depend on the facts of each case. In our present case, by not requiring the listing of the serial numbers of the share certificates, identication was hardly possible and I find it difficult to come to any other conclusion that that it was intended to leave the company free to substitute shares listed in the current daily certificate. Even if there was no question of identifying share certificates from a larger bulk (where the quantity of shares of a counter held was the same as that hypothecated), there would still be liberty on the part of the company to substitute shares. Let me illustrate the point this way. Let us assume for a moment that the company had a million shares of a counter and that appeared in ten consecutive daily certificates. That did not necessarily mean that the same share certificates had been charged. More likely than not, the million of one day would be different from the million of the very next day and so on. In short, the arrangement allowed the company to trade.

Whether a company has the freedom to carry on its business is not based on special words creating that freedom but on the nature of the charge itself (Fletcher-Moulton L.J. in *Rival Granite Quarries*[4] at p. 995). In the present case, without the serial number of the share certificate, the company could easily substitute share certificate of one counter with another share certificate of the same counter without having to make any amendment to the daily certificate. This turnover, which is a normal feature in a stockbroking firm and which was recognized in the system of daily certificates, would be quite inconsistent with a fixed charge. Shares and securities are the stock-in-trade of a stockbroking company. As Fletcher-Moulton L.J. described in *Rival Granite Quarries Ltd.*[4] at p. 994, the characteristic of the floating charge is "the non-permanence of the property which is the subject of the charge, and its constant change from time to time." In this regard, I will also allude to the following statement made by Vaughan Williams L.J. in *Re Yorkshire Woolcombers Association*[6] at p. 294:

"... what you do require to make a specific security is that the security, whenever it has once come into existence, and been identified or appropriated as a security *shall never thereafter at the will of the mortgagor cease to be a security. If at the will of the mortgagor he can dispose of it and prevent its being any longer a security, although something else may be substituted more or less for it, that is not a 'specific security'.*"

Without the serial numbers of the share certificates, there was nothing to preclude the company from making the substitution as aforesaid. To my mind, the security created was a floating charge.

If there is any doubt remaining as to the nature of the charge created, then surely the fact that the company could, and indeed was obligated to, issue daily certificate automatically without the issue being subject to the consent of the bank, provided perhaps the shares listed in each daily certificate were up to the required value, is clear indication that the shares listed in each daily certificate could be altered by the company at its will. The situation fell squarely within what Vaughan Williams L.J. said in *Re Yorkshire Woolcombers Association*[6]: "If at the will of the mortgagor he can prevent its being any longer a security, although something else may be substituted more or less for it, that is not a specific security." I would go far as to say that this feature alone, apart from the reasons abovementioned based on the absence of the serial numbers of the share certificates, is sufficient to render the security a floating charge. I

say so because even if the daily certificate had listed out the serial numbers of the share certificates, but if the company could substitute shares listed in one daily certificate with other shares listed in the next daily certificate, then what Vaughan Williams L.J. said equally applies. Mr. Lloyd seemed to accept that there was this liberty on the part of the company to issue new daily certificates which might contain different shares provided they were up to the required value. However, he sought to qualify it by saying that any new daily certificate had to list shares acceptable to the bank. But there was nothing explicitly to that effect in the LOH.

I would pause here to refer again to the three characteristics mentioned by Romer L.J. in *Re Yorkshire Woolcombers Association*[6] as constituting a floating charge. In my view, our present case had all the three characteristics. First, the LOH created a charge over a class of assets, *i.e.* all present and future shares *etc.*, in the possession of the company. Second, as evidenced by the daily certificates, the shares which were the subject of the charge were in the course of business of the company changing from time to time. Third, the company was permitted to carry on its business in the ordinary way, *i.e.* buying and selling shares. Of course, I would hasten to add that Romer L.J. also recognized that an instrument might still be a floating charge even if it did not have all the three characteristics.

What then, one may ask, was the purpose of the system of daily certificate? The same question may be posed with regard to the other clauses in the LOH which purported to restrict the rights of the company to deal with the shares listed in the daily certificate. I do not think it is possible to completely reconcile all the clauses in the LOH. There are difficulties. But I would venture to think that the system of daily certificate was introduced in the LOH as an added administrative measure for the bank's own purposes. Floating charges are after all a specie of contract which can be adapted by the parties to suit their needs – see Palmer on *Company Law* Vol. 1 (23rd Ed.) at paragraph 44-10. It does not follow that the absence of one or more of those usual features or the presence of others will necessarily prevent a charge from being categorized as "floating". There are bound to be penumbral cases in which it may be difficult to say whether the degree of deviation from the standard case is enough to make it inappropriate to describe it as such. As stated by Hoffman J. in *Re Brightlife Ltd.*[19] at p. 680 it is fallacious to argue that once the parties have agreed on some terms which are thought sufficient to identify the transaction as a floating charge, they are then precluded from agreeing to any other terms which are not present in the standard case. The existence of restrictive clauses in an instrument does not *ipso facto* render an instrument a fixed charge as stated by Porter J. in *Mercantile Bank of India* v. *Chartered Bank of India, Australia & China and Strauss & Co. Ltd.*[20] at p. 240:

> "It is quite true that, in one case, on the question of restraint the phrase 'restraint upon dealing with the goods' was used as being an element in determining whether there was a floating charge or not; but it is equally plain that there may be matters of restraint which may leave the document a floating charge."

In my view, in construing the LOH, I cannot ignore the essential characteristics of the business of the company. The issues raised in this originating summons are certainly novel and there appears to be an absence of authority on point. It seems to be the first case of its kind. I have given the case the most anxious consideration because of its unusual features. The transaction must be viewed in the commercial context in which the LOH was given. Only when this is done can the court objectively determine the "aim" of the transaction. I ought to state that at the time when each relevant LOH was created, there was nothing to suggest that the company was in financial difficulties – a point which seemed to have had considerable bearing in the decision of the appeal court in *Re Keenan Bros. Ltd.*[21] Not without some significance, the LOH did not expressly state that it created a fixed charge. The bank must have realized that it was impractical to create a fixed charge over the stock-in-trade of a stockbroking company. Conversely, by reserving to the company the right to issue daily certificates which would list such shares as it deemed fit up to the required value and by not requiring the furnishing of the serial numbers of the share certificates charged, it seems to me that the company was given a licence to deal with the shares listed in the daily certificates.

I am mindful of the fact that the LOH did not contain any provision for crystallization. But as Hutton J. said in *Re Armagh Shoes Ltd.*[9] at p. 411: "The fact that the deed contains no provision relating to the circumstances in which the charge will crystallize does not prevent the charge from being a floating charge."

For all the above reasons, I would hold that the LOH issued to OCBC in its true nature created a floating charge. For much the same reasons, I would also hold that the other LOHs issued to the other twenty defendants also created floating charges. The fact that in one case (the LOH issued to 2nd defendant) the certificate was not to be issued daily but weekly does not appear to me material.

Before I pass on to the next issue, I would like briefly to touch on one special feature in the LOHs issued to the 12th and 14th defendants. This feature was also to be found in the letters of offer to the company from the 18th defendant though not in the LOH issued to that defendant and I would assume for this purpose that made no difference. I am referring to the obligation on the part of the company to specially earmark the shares hypothecated or place the shares in a compartment or cabinet properly labelled in the name of the relevant bank. While this feature removed difficulties relating to identification discussed above, it in no way altered the position that the company was given the licence to trade by the issue of daily certificates.

I will now turn to deal with the two points raised by counsel for the liquidators that the LOH also failed to create a floating charge. The first point is that for there to be a floating charge all the undertaking of the company or a class of the assets of the company must be charged by the LOH. This, she alleged, was not the case here. The second point relates to the failure by the bank to register the daily certificates which meant that the charge was void as against the liquidators.

The operative part of the provision in the LOH charged to the bank "all shares, stocks, bonds securities and documents which are now or shall at any time hereafter be" in the company's custody or possession. This clearly referred to both present and future assets of the company. Mr. Lloyd in his alternative argument (his main argument being that the LOH created a fixed charge) contended that looking at the LOH and the transaction as a whole, it is "possible to regard the LOH as creating a floating charge over the shares, stocks *etc* then or thereafter in the company's possession, the daily certificate having the function of defining or limiting the scope of the assets within the class to which, for the time being, the bank can have recourse." That is one view. Another view would be, for the reasons which I have discussed above, to treat the daily certificate as merely an administrative device. It should be treated as merely setting out information for the comfort of the bank. It did not alter the basic premise that all the stocks, shares, *etc* were charged to the bank. That was a class of assets. I am inclined to adopt this view.

Since I take the view that the daily certificate, as a document, was of no real legal effect, it must follow that the failure by the bank to register it was also of no consequence. Even if I should be wrong in this view, and if the effect of the daily certificate should be as what Mr. Lloyd contended (*i.e.* the function of defining or limiting the scope of the assets within the class, for the time being,the bank can have recourse), the failure to register the daily certificate was hardly fatal. The document that created the floating charge was the LOH and that had been registered. The assets affected by the charge were described in the particulars lodged with the Registrar of Companies. Counsel for the liquidators did not allege that the particulars furnished were in any way improper or materially inaccurate.

Section 134(2) (previously section 111(2)) of the Companies Act provides that "... the certificate (of registration of the registrar) shall be conclusive evidence that the requirements as to registration have been complied with." There is a clear line of authority which says that where a certificate has been granted the court will refuse to go into the question whether the requirements for registration have, in fact, been complied with. As decided in *Re Yolland, Husson & Birkett Ltd.*[22] the object of this provision is to protect the grantee of the charge and as between him and the general body of creditors and potential creditors, the Registrar is appointed as the tribunal to decide what shall be put upon the register and when it has been put there his certificate to that effect is conclusive evidence that all the requirements of the section have been complied with.

In the later case *National Provincial & Union Bank of England* v. *Charnley*[3] a company "demised" to the plaintiff-bank a certain leasehold factory with all the movable "plant used in or about the premises" as security for overdraft facilities. In the particulars of the charge which were submitted to the registrar, the instrument was described as a mortgage of the leasehold premises and no mention was made of the chattels. The registrar so registered the charge without mentioning any charge over the chattels. Subsequently, a judgment creditor sought to levy execution on the chattels.

The issue was whether the plaintiff-bank as mortgagee was entitled to the chattels notwithstanding that the chattels were not referred to either in the particulars submitted to the registrar or in the register of charges. Bankes L.J. said (at p. 444):

"It is quite true that there is an omission ...; but when once the registrar has given his certificate that the registration was complete, and that the mortgage or charge was created by an instrument identifying it, in my opinion you have to go to the instrument to see what was actually charged, there being nothing in the statute which says that once registration has taken place the register shall be the evidence of the extent of the charge. All that the statute requires is satisfaction on the part of the appointed official that the preliminaries have been complied with, and, when once he certifies that, the parties are entitled to ask the court to say that what it has to look at in order to determine their rights is the instrument creating the mortgage or charge."

and Atkin L.J. stated the following at p. 452:

"It appears to me to be the true view that when once such a certificate has been given by the registrar in respect to a particular specified document which in fact creates a mortgage or charge, it is conclusive that the mortgage or charge so created is properly registered even though the particulars put forward by the person applying for registration are incomplete and the entry in the register by the registrar is defective."

A similar decision was reached in *Re Mechanizations (Eaglescliffe) Ltd.*[23] where two charges were executed as security in respect of a certain principal sum, plus interest and other sums. The registration made no mention of interest and the other sums: an omission of the mortgagees. The question for determination was whether the mortgagees were entitled to the full benefit of the two charges or whether, having regard to the method of registration, they were only entitled to a smaller amount as secured creditors. The court held that once a charge was registered, that was conclusive that the necessary preliminaries for registration had been complied with and that the prescribed particulars had been delivered to the registrar. Buckley J. said at p. 35:

"... the effect of the certificate is to put it out of anybody's power to say that the prescribed particulars have not been presented to him and, therefore, where a certificate has been given the charge cannot be void under section 95(1)" [the equivalent to our section 131(1)].

"In order to discover the terms and effect of the charge ... one must look at the document creating the charge and not at the register. It is from that document that one will discover what moneys are secured and what is the total amount secured by the charge."

In other words, the certificate was conclusive evidence not of the correctness of the particulars stated in the certificate itself, but of compliance with the requirements of the statute.

The decision in *Charnley*[3] was expressly upheld and applied in a somewhat different situation in *Re C L Nye Ltd.*[24] where a company created a charge (undated) in favour of a bank for overdraft facilities. All the documents were delivered to the bank's solicitor on 24 February 1964. It was subsequently mislaid by the solicitor and not discovered until 18 June 1964. The solicitor thereupon inserted that date as being the date when the charge was created and lodged registration on 3 July with the prescribed particulars. In the meantime on 9 March, the bank had honoured cheques drawn by the company on the security of the charge. The company went into liquidation on 16 July 1964. The Court of Appeal held that, assuming without deciding that the date of the creation of the charge was 9 March 1964, when the bank began to lend money to the company on the security thereof, notwithstanding that the date of the charge was incorrectly stated in the particulars delivered to the registrar, once the certificate was granted that was conclusive evidence that all the requirements of the Act as to registration had been complied with. The requirement for delivery of the particulars within 21 days was not a condition precedent to the registrar's jurisdiction to register the charge or grant a certificate. Harman L.J. dealt with the arguments raised on behalf of the liquidators in that case as follows (at pp. 469-470):

"In the *Eric Holmes* case Mr. Slade appeared for the liquidator and argued in the same sense as he argues here, namely, that while the certificate is conclusive as to the correctness of its contents it is not conclusive as to the date of its creation and that *Charnley's* case [1924] 1 K.B. 431 was thus distinguishable. This argument was based in part at least on the view that where there is an instrument creating the charge which is available to the registrar he can check the correctness of the particulars, but he has no such means where the date of the creation is concerned. This argument does not survive the test where the charge is created without any instrument at all and therefore none can be delivered to the registrar. In my judgment the certificate must be conclusive in part as the liquidators argue. The whole point of creating the register under section 95 is to give security to persons relying on the certificate. If it were possible to go behind the certificate and show that the date of the creation of the charge made it out of time, no lender on the faith of the charge could be secure and sure that it would not thereafter be attacked by somebody who could successfully prove that there was in fact an interval of more than 21 days between the charge's creation and its registration. This would be disastrous in my opinion and is not a view to be taken unless the language positively compels it. I find no such compulsion and see no reason why the word 'conclusive' should not mean what it says. The legislature

in 1900 imposed on limited liability companies the obligation to disclose the charges they created. This was to the great advantage of the unsecured creditors but a limit was put to that advantage by giving a responsible official the right to judge whether all the prescribed particulars were in order. Once he has done this, in order they are, even though the company has misstated them or the registrar has taken a wrong view.

Mr. Slade's argument was that it was a condition precedent to the registration of a charge by the registrar that the particulars should have been delivered to him in time and that if that were not done he had no jurisdiction and the registration was a mere nullity. I cannot accept this view. The duty to register the prescribed particulars is put on the registrar; the date of the creation of the charge is one of the particulars he is required to enter and if he is not in a position to investigate the matter further but acts on the particulars furnished by the applicant company that is the end of the matter. *Charnley's* case [1924] 1 K.B. 431 is indistinguishable from the present. The certificate is no less conclusive as to date than as to amount and to hold otherwise would frustrate the whole purpose of the legislature."

In the light of the foregoing authorities, there can be no doubt that even if each daily certificate should be registered and it was not registered, that omission would not invalidate the LOH which had been registered. I accept the submission of Mr. Lloyd on this point. The registration certificate of the registrar must, as section 134(2) provides, be treated as conclusive.

There remains one subsidiary issue before me. What is the significance of the "nil" certificate dated 25 February 1986 issued by the company to the banks. In the light of the views which I hold that the LOHs created a floating charge over all shares held by the company and that the daily certificate was of no legal effect, it must follow that the "nil" certificate was also of no legal consequence.

Another reason I think the "nil" certificate was of no effect is because it was issued after the floating charge had crystallized. I realize that the question of the date of crystallization has not been fully argued before me though the parties have referred to it and seemed to be in agreement that 22 February 1986 was the date of crystallization.

From the affidavits filed by the liquidators, it would appear that the company to all intents and purposes ceased to carry on its normal business of stockbroking on 22 February 1986. Lord MacNaghten in *Government Stocks And Other Securities Investment Co.* v. *Manila Ry. Co.*[5] at p. 86 said:

"It is of the essence of such a charge that it remains dormant *until the undertaking charged ceases to be a going concern*, or until the person in whose favour the charge is created intervenes."

Gough on *Company Charges* in dealing with the grounds for crystallization states at p. 85:

"The precise grounds for crystallization may now be examined. All of them, as they emerge from the cases, postulate the stoppage of the company as a going concern and the consequential cessation by the company of trading in the ordinary course (at least as regards the assets subject to the floating security). A floating security, then, crystallizes in the following circumstances:

...

(2) If the company itself stops trading in fact without as yet being in winding-up."

Accordingly, in my view, in this case crystallization took place on 22 February 1986.

Order accordingly.

Solicitors: *Chor Pee & Co.; Khattar Wong & Partners; Drew & Napier; Lim & Lim; Chan Cher Boon & Partners; Allen & Gledhill; Shook Lin & Bok; Haridass Ho & Partners; Wong Yoong Tan & Molly Lim; Ruth Chia & Co.; Tang & Tan; Chung & Co.*

NG CHYE MONG PTE. LTD. v. PUBLIC PROSECUTOR

[A.Cr.J. (Chan Sek Keong J.C.) 29 February 1988]

[Singapore – Magistrate's Appeals Nos. 124 and 197 of 1987]

Criminal Law – Trade marks – Counterfeit labels – Selling bottles of liquor with counterfeit trade mark – Function of trade mark – Trade mark law – Explanation of – Whether need to prove that contents of bottles were also not genuine – Nature of offence – "Counterfeit" – Meaning of – Trade Marks Act (Cap. 206, 1970 Ed.), ss. 69A, 69B & 69D – Penal Code (Cap. 103, 1970 Ed.), s. 28.

Trade Marks – Counterfeit labels – Selling bottles of liquor with counterfeit trade mark – Function of trade mark – Trade mark law – Explanation of – Trade Marks Act (Cap. 206, 1970 Ed.) – Legislative history of – Whether need to prove that contents of bottles were also not genuine – Nature of offence – "Counterfeit" – Meaning of – Trade Marks Act (Cap. 206, 1970 Ed.), s. 69A, 69B & 69D – Penal Code (Cap. 103, 1970 Ed.), s. 28.

The appellants were convicted in a magistrate's court for selling 17,246 bottles bearing the counterfeit trade marks of Hennessy XO Cognac to one Lim Kim Teck who was the